U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 August 2006

BALCA Case No.: 2006-INA-00027
ETA Case No.: P2003-CA-0942197/JS

In the Matter of:

VILLA SOMBRERO RESTAURANT,
Employer,

on behalf of

MANUEL WONG-CHAN,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Glenn N. Kawahara
Los Angeles, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon

1 This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 2, 2001, the Villa Sombrero Restaurant ("Employer") filed an application for labor certification to enable Manuel Wong-Chan ("Alien") to fill the position of "Cook." (AF 73).

On April 18, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification because, among other reasons, the Employer failed to document a sufficient attempt to recruit a U.S. worker in compliance with 20 C.F.R. § 656.21(b)(6). (AF 68). To correct such action, the CO directed the Employer to show "who called him/her, when, and show how the messages were left…and indicate exactly what information was provided in the phone messages." (AF 69).

The Employer filed rebuttal dated May 20, 2005. (AF 13). The Employer stated that phone records would not be provided but offered statements of the messages and a probable explanation for U.S. worker's failure to respond to messages and certified mail—i.e. that the U.S. applicant was overqualified and uninterested in working for the Employer's family-style restaurant in view of his credentials.

The CO issued a Final Determination denying certification on August 22, 2005 based on the Employer remaining in violation of 20 C.F.R. § 656.21(b)(6). (AF 7). The CO observed that the Employer provided speculative reasons why the applicant may not have responded to the calls and certified letter, yet failed to include the information requested by the CO in the Notice of Findings. In addition, no phone records were provided. The CO concluded that the Employer had failed to "document a good faith effort to recruit [the U.S. applicant]." (AF 7).

Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

The Employer filed a Request for Review with the Board of Alien Labor Certification Appeals ("BALCA" or "Board") on September 20, 2005. (AF 1). The Employer contends that the CO failed to take his arguments into consideration and that the CO placed an unreasonable burden on the Employer to actively recruit a U.S. worker.

DISCUSSION

In the instant case, we find that the U.S. applicant was not recruited in good faith in accordance with 20 C.F.R. § 656.21.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp,* 1987-INA-659 (Jan. 13, 1988)(en banc). It was reasonable for the CO to request information about who telephoned the applicant, when the call(s) were made, and the contents of the message left. It was also reasonable to require him to produce phone records. The Board has ruled that if an employer asserts that local phone records are not available, it should, at the minimum, be prepared to document that it asked the phone company for such records in a timely fashion. *M.N. Auto Electric Corp*., 2000-INA-165 (Aug. 8, 2001) (en banc). The Employer has failed to state that the phone company was contacted for such records or provide any explanation at all for not producing the records. The Employer's rebuttal confirms the CO's concern that the Employer failed to document with any specificity, other than pure conjecture, the reason behind the applicant's non-response to either the certified mail or the alleged telephone messages. Though the Employer did, himself, take credit for contacting the U.S. applicant on December 2, 2002, no further information regarding the call or subsequent calls was provided. (AF 78).

As the CO discussed in his findings of fact, despite the proof of the Employer's certified letter discussing the wish to interview the U.S. applicant, "the tone of the letter suggests that the applicant did not return multiple telephone calls. Whether the employer made a good faith attempt to recruit him or her depends on the content of the telephone messages." (AF10). The fact that records were not kept is to the detriment of the

Employer. Only two U.S. applicants were referred to the Employer, making the recordkeeping less than onerous. (AF 86).

The burden of proving that a U.S. worker was pursued in good faith rests squarely on the shoulders of the employer, not the CO, pursuant to 8 U.S.C. § 1182(a)(5)(A). "[I]t is the burden of the alien, or more accurately the employer on behalf of the alien, to establish to the Secretary's satisfaction that U.S. workers are not available to perform the job... ." *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc). The CO is not required to accept written statements provided in lieu of independent documentation as credible or true, but must consider them and give them the weight they rationally deserve. *Gencorp, supra*. Therefore, the Employer's statement, "[phone] records are not available and will not be provided" (AF 14) is unacceptable and does not constitute *convincing* evidence under *Gencorp*. The Employer's statement is not objective evidence to satisfy the Employer's burden in this case. Accordingly, we affirm the CO's denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.